Supreme Court of the United States,

DECEMBER TERM, 1873.

JOHN F. BAILEY, *Assignee*,

VS. No. 518.

NATHANIEL B. GLOVER, *et al.*

I.

THE case made by the bill is one touching the property and rights of property, of the bankrupt, Benjamin Glover, and comes within the limitation contained in the fourth paragraph of the second Section of the Bankrupt Act of 1867. The bill was filed too late. The bankrupt filed his petition on the seventeenth March, 1869, and Complainant was appointed his assignee on the first December, 1869. The right of Complainant to bring his suit accrued on his appointment, and under the second Section of the Act he could only bring his suit within two years from the time the cause of action accrued. This bill was not filed till January the twentieth, 1873, more than two years after the cause of action accrued. In fact, as shown by the allegations of the bill, more than two years after the final discharge of the bankrupt on the eleventh April, 1870. The eighth Section of the Bank-

rupt Act of 1841 is similar to the fourth paragraph of the second Section Act of 1867. On that Section the following decisions, sustaining one ground taken in the demurrer, were made:

Comegys vs. McCord, 11 Ala. Reps. 932.
Harris vs. Collins, 13 Ala. Reps. 388.
Paulding vs. Lee, 20 Ala. Reps. 753.
Clark vs. Clark, *et al.*, 17 How., 815.
Ex parte Conant 5 Blatch, C. C. Reps. 54.
Clark vs. Hockett, 1 Cliff., Reps. 269.

II.

The bill attempts to take the case out of the Statute, by alleging that the fraud was not discovered until within two years before the filing thereof. The answer to this is two-fold: First, that Complainant does not by the allegations of his bill, bring the case within the exception to the ordinary statute of limitations.

Angell on Limitations, Secs. 25 to 31.
Kane vs. Bloodgood, 7 John., ch. Reps. 122.
Bank of U. S. vs. Daniels, 12 Peterson, p. 56.
Moore vs. Green, *et al.*, 19 How., 69.
Harwood vs. Railroad Co., 17 Wall, 78.
Buckner & Stanton vs. Calcote, 28 Miss. Reps. p 595
Stearns vs. Page, 7 How., 819.
Carr vs. Hilson, 1 Curtis Reps., 390.

Second, this Statute is imperative, admitting of no exceptions, as to any tribunal, and consequently sets aside the rule invoked, as to bankruptcy cases under the Act. See fourth paragraph of Section second of the Act, and the cases referred to under the first head of this brief.

III.

If the Complainant's bill is to be regarded as in effect a bill to set aside the final discharge of the bankrupt, Benjamin Glover, under the proviso of Section 39 of the Act, then it was filed too late, more than two years having elapsed from the time of the date of his discharge.

See authorities cited under the first head of this brief.

IV.

The objection for multifariousness is well taken.—The alleged assignments, transfers and conveyances, are of separate and distinct property, made to separate and distinct persons, not alleged to have any connection with each other, and cannot properly be united in the same Bill of Complaint. The bill unites improperly distinct matters, and joins improperly several Defendants.

Story's Eq. Pl. Secs. 271, &c.
1 Daniell's ch. Pl. and Pr. 342, &c.
Cutting vs. Gilbert, 5 Bl. C. C. 259.
Shields vs. Thomas *et al.*, 18 How., 253.

S. J. CUMMING,
Attorney for Elenora Glover and
Hugh G. Weir, *Appellees.*

Supreme Court of the United States.

Bailey, Assignee, Glover,
v.
Weir, Glover et al.

No. 225.

CONSTRUCTION OF THE STATUTE OF LIMITATIONS IN THE SECOND SECTION OF THE BANKRUPT ACT.

BRIEF OF P. PHILLIPS,
Of Counsel for Appellant.

S. & R. O. Polkinhorn, Printers, Washington, D. C

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Supreme Court of United States.

BAILEY, Assignee in Bankruptcy of Benjamin Glover
v.
WEIR, GLOVER ET AL.
No. 225.

BRIEF OF P. PHILLIPS,
FOR APPELLANT.

This is a bill filed by the appellant, in which it is averred that Glover, the bankrupt, was indebted to Winston & Co., in the sum of $10,500, by a bill of exchange drawn by Creagh on Glover, on 21 June, 1861, payable 1 January, 1864, in favor of Winston & Co.

That this bill was subsequently transferred to Gertrude Jones, and the same not being paid at maturity, she brought suit thereon in the Circuit Court of Wilcox, Alabama, against said Glover, and recovered judgment thereon in 1867, for $13,580.

That this judgment was, for a valuable consideration, assigned to W. H. Winston, who before the filing of the petition in bankruptcy, assigned the same to Winston & Co.

That prior to the assignment by W. H. Winston, there had been collected on a judgment obtained against Creagh, the drawer, $1,428.

That before the acceptance of said bill by Glover, and

ASSIGNMENT OF ERROR.

From this decree the appeal is taken and the appellant now assigns for error the sustaining of the demurrer and the dismissal of the bill.

The case then is this: The assignee brings his bill against the defendants who are charged with holding property of the bankrupt by a fraudulent combination with him to defeat his creditors.

And it is averred that this fraud was *concealed* by defendants, so that knowledge of it only came to the assignee until within a year of the filing of the bill.

The demurrer admits:

1st. That the defendants hold the property in fraud of the creditors.

2nd. That they so concealed the fraud that the assignee only came to the knowledge of it within a year from filing the bill.

The question then is, whether the 2d section of the Bankrupt act, protects persons fraudulently obtaining property from the bankrupt, in the enjoyment of the fruits of their fraud—if they are able to conceal from the assignee the knowledge of their fraud for two years.

To answer such a proposition in the affirmative, we must find in the words of the act instruction so explicit as to leave no room for construction.

The words of the act are:

"The Circuit Court shall have concurrent jurisdiction

of all suits at law or in Equity, brought by the assignee, against any person *claiming* an adverse interest; or by such person against the assignee touching the property of the bankrupt transferable to, or vested in the assignee; but no suit at law or in Equity shall in any case be maintainable by or against such assignee, or by or against any person *claiming* an adverse interest, touching the property or rights of property aforesaid, in any court whatsoever, unless the same shall be brought *within two years from the time of the cause of action accrued for or against such assignee.*" 14 Stat., 518.

There are other provisions which may be referred to in this connection.

The 14 section provides that on the appointment of the assignee all the property and estate of the bankrupt shall "*vest*" in him together with "*all the property of the bankrupt conveyed in fraud of his creditors,*" and he is directed to *sue for and recover the same.*

The 35 section makes void all transfers of property within six months of the filing of the petition when made in fraud of the act, and the assignee is directed to recover the same.

Assuming for the present that the case is to be decided on the construction of the 2d section, the question arises—when, in the meaning of that section, did the cause of action "accrue" to the assignee?

The 2d section is a transcript of the 8 section of the Bankrupt act of 1841, and the precise question was decided by Judge Curtis in the case of Carr v. Hilton, 1 Curtis, 237, where it was held that long before the statute was enacted the same words in Statutes of Limitation had received a construction both in England and America, at law and in Equity, and in courts of the United States as well as in others tribunals.

Statutes of Limitation do not run in cases of fraud while it is secret.

Some difference of opinion has existed respecting the ground for this rule; but in my judgment, the most reasonable and sensible ground is, that substantially the title to avoid the transaction *does not arise until the fraud is known.*"

The action does not "*accrue*" while the fraud is concealed, and this interpretation I must consider to have been within the intent of the Legislature, when it used the same language which had acquired a settled meaning to that effect."

Among the cases cited by him are:

Mass. Turnpike v. Field, 3 Mass., 201.

Homer v. Fish, 1 Pick., 435.

Wells v. Fish, 8 Pick., 74.

Sherwood v. Sutton, 5 Mason, 143.

Mitchel v. Thompson, McL. 96.

The language of Parsons, C. J., in the first case cited by Judge Curtis, is very emphatic: "The statute cannot be considered as intending to protect any man in the quiet enjoyment of the fruits of his fraud if the action be commenced within six years after the discovery of the fraud. The delay in bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued until the plaintiff could obtain the knowledge that he had a cause of action. If this knowledge is fraudulently concealed by defendant we should *violate a sound rule of law if we permitted him to avail himself of his own fraud.*"

In Sherwood v. Sutton *supra* Justice Story held that "every statute is to be expounded reasonably, so as to

suppress, and not to extend the mischiefs it was designed to cure. The Statute of Limitations ought not to be construed so as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud therefore form an implied exception, to be acted on by courts of law and equity according to the nature of their respective jurisdictions. Such, it seems to me, is the reason on which the exception is built, and not merely that, there is an equity binding upon the conscience of the party which the statute does not reach or control."

This question does not seem to have had an express adjudication in this court, but in the case of Wilcox v. Plummer, 4 Pet., 182, the decision of Granger v. George, is referred to, 11 Eng., C. L. 136, in which Abbott C. J. held that the Statute began to run from the time of the act done by the defendant, although the plaintiff had no notice of it; *there not being evidence of any fraud practiced by the defendant in order to prevent the plaintiff from obtaining knowledge of that which had been done.* The plaintiff was certainly guilty of laches in not making proper inquiries.

This decision is in conformity with the ruling of Mansfield in the case of Brie v. Holbeck. Douglas R. 654.

Some of the elementary writers in this country assert this doctrine very confidently.

Thus, Mr. Greenleaf in his treatise on evidence, § 448: "The bar of the statute may also be avoided by proof of fraud committed under such circumstances as to conceal from the plaintiff all knowledge of the fraud, and thus prevent him from asserting his right until a period beyond the time limited by the statute."

On the other hand Mr. Parsons speaks less confidently. He says "there is some difficulty in giving effect to it at law. Nevertheless the prevailing rule in this country prevents the statute from beginning to run until the fraud is discovered by the plaintiff." 2 Parsons, 378.

We have heretofore considered the case as governed by the two years limitation of the second section.

We now submit the proposition that this section does not apply to the present proceeding.

That section refers to suits brought by the assignee "against any person *claiming* an adverse interest."

The present fraudulent possessors of the bankrupt's property, never made known their interest. The assignees by their concealment had no knowledge of their claim.

The evident intention of the section was to apply the limitation when an adverse interest *was asserted.* In such a case it was only reasonable that a Statute of Limitation should exist. To apply it to an interest concealed, and of which the assignee could have no knowledge, would be unreasonble.

We look now to the provision of the 14th section by which the assignee is vested with all the real and personal property of the bankrupt. We find that just such a case as this is specially provided for, in the declaration that "*all the property conveyed by the bankrupt in fraud of his creditors,*" shall be "at once vested in the assignee," with the power "to sue for, recover or defend the same, as the bankrupt might or could have had, if no assignment had been made."

In this section for the recovery of property thus

fraudulently conveyed, there is no mention of a Statute of Limitations.

Suit for such property would fall within the operation of the limitation acts of the State, and as we read the act, it was intended that they should be so controlled.

If we are right in this, then there was no bar to this proceeding even if it had assumed the form of an action at law.

Much less is there any bar to a bill in equity when the fraud has been concealed.

As to equity proceedings when there has been fraud and a concealment of it, there is no contrariety of doctrine; concealed fraud is a good reply to the statute.

Beyond all doubt, by the express words of the statute, the *title* to the property "conveyed by the bankrupt in fraud of his creditors," vested in the assignee.

This title cannot be defeated by a fraudulent possession until the assignee has been guilty of some laches.

It could not have been intended to vest the assignee with the title, and at the same time to deprive him of its benefit, when the possessor had concealed from him all knowledge of its existence.

On these considerations we submit that the decree should be reversed.

P. PHILLIPS,

For Appellant.

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Snodgrass v Sicalm